NO. 22263

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR QUEVEDO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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TOPICAL INDEX

Page

Table of Authorities ii

I STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION. 1

II STATUTES INVOLVED 3

III QUESTIONS PRESENTED 5

IV STATEMENT OF THE FACTS 5

V ARGUMENT 8

CONCLUSION 12

CERTIFICATE 13

TABLE OF AUTHORITIES

Cases

Cases	Page
Hill v. United States, 261 F. 2d 483 (9th Cir. 1958)	9
Masciale v. United States, 356 U. S. 386 (1958)	10
Notaro v. United States, 363 F. 2d 169 (9th Cir. 1966)	9
Sherman v. United States, 356 U. S. 369 (1956)	9, 10
United States v. Whiting, 321 F. 2d 72 (1st Cir. 1963)	11

Statutes

Statutes	Page
Title 18, United States Code, §3231	3
Title 21, United States Code, §176a	3
Title 26, United States Code, §4742(a)	5
Title 28, United States Code, §1291	3
Title 28, United States Code, §1294(1)	3

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On September 14, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in three counts against appellant Hector Quevedo. This indictment was as follows: [C. T. 2] [1]

> "Count One. On or about April 14, 1966, in Los Angeles County, California, within the Central Division

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[1] C. T. refers to Clerk's Transcript herein.

of the Southern District of California, defendant HECTOR QUEVEDO, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 2,786.700 grams of marihuana, which said marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

"Count Two. On or about April 14, 1966, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HECTOR QUEVEDO, with intent to defraud the United States, knowingly sold to Agent David Westrate of the Federal Bureau of Narcotics and an undercover assistant of the Federal Bureau of Narcotics 2,786.700 grams of marihuana, which said marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

"Count Three. On or about April 14, 1966, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HECTOR QUEVEDO, knowingly and unlawfully transferred 2,786.700 grams of marihuana to Agent David Westrate of the Federal Bureau of Narcotics and an undercover assistant of the Federal Bureau of Narcotics without obtaining from either of them a written order on a form issued for that purpose by the Secretary of the Treasury

of the United States."

Pursuant to appellant's plea of not guilty, entered on September 19, 1966, trial by jury was set for October 17, 1966. On the latter date, trial was continued to November 7, 1966. Appellant waived his right to trial by jury and trial commenced on November 8, 1966, before the Honorable Albert Lee Stephens, Jr.

On November 9, 1966, the court found appellant guilty on all counts of the indictment [R.T. 176].[2/]

On December 5, 1966, appellant was sentenced to serve a term of five years imprisonment on Counts One, Two and Three of the indictment, said term to run concurrently on all three counts. [C.T. 50].

A timely notice of appeal was filed on December 8, 1966 [C.T. 51].

Jurisdiction of the District Court was based on Title 21, United States Code, Section 176a, and on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 21, United States Code, Section 176a reads as follows:

[2/] R.T. refers to Reporter's Transcript herein.

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26, United States Code, Section 4742(a) reads as follows:

> "It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

QUESTIONS PRESENTED

Is the evidence sufficient to sustain the Court's finding that no entrapment of appellant occurred?

IV

STATEMENT OF THE FACTS

Both Lonnie Van de Ford and Don Schutz were, during April 1966 and for a few months prior thereto, working with the Federal Bureau of Narcotics as special employees, i. e., as undercover assistants [R. T. 40, 73-74]. Both were, at the time of trial below, facing federal charges for the illegal transportation of marihuana [R. T. 40, 73]. Both participated in the negotiations with appellant for the purchase from appellant,on behalf of the Federal Bureau of Narcotics, of the marihuana described in the

indictment herein. That purchase was consummated on the night of April 14, 1966.

Van de Ford and Schutz had been aware of appellant's identity for several years [R. T. 42, 75]. Schutz in particular had telephoned appellant and visited his residence on several occasions during a period of several months prior to April 14, 1966, and, although he did not ask appellant to sell him marihuana during that period, he was aware that appellant was selling marihuana to other persons [R. T. 85]. Van de Ford first met appellant in April of 1966, at the apartment of two personal friends of appellant named Bunny and Bones, a male and a female, at 7114 Ethel Street in the San Fernando Valley [R. T. 44]. Prior to April 14, 1966, Van de Ford saw appellant bring two kilograms of marihuana to Bunny and Bones' apartment [R. T. 44].

At the trial below, appellant took the stand and testified that prior to April 14, 1966, probably in March, he had sold a kilogram of marihuana to one Larry Brittenham [R. T. 144-145]. Appellant's source of supply was one Darrel Williams, and he had been buying from Williams for a year or two prior to April, 1966 [R. T. 145]. Appellant also sold a kilogram of marihuana to Bunny and Bones prior to April 14, 1966 [R. T. 146]. Prior to April 14, 1966, appellant had sold a total of about ten kilograms of marihuana to Brittenham, according to Brittenham's testimony at trial [R. T. 108-109].

The first time when Van de Ford and Schutz asked appellant to get some marihuana for them was on April 12, 1966 [R. T. 148].

On that evening Van de Ford introduced appellant to Agent David Westrate of the Federal Bureau of Narcotis; the meeting took place at Bunny and Bones' apartment at 7114 Ethel [R. T. 18, 46]. At that time Westrate, in the presence of Van de Ford, had a discussion with appellant about marihuana; appellant told Westrate that he could furnish marihuana to Westrate in kilogram quantities [R. T. 19]. However, appellant said he would be unable to secure any marihuana on that evening [R. T. 19].

On the evening of April 14, 1966, Westrate and Van de Ford, together with Charles Walker, another agent, again went to Bunny and Bones' apartment [R. T. 21] but failed to find appellant there. They telephoned appellant [R. T. 23] and held a conversation with appellant regarding the purchase of marihuana; appellant advised them that he was prepared to sell three kilograms of marihuana to Westrate and the informants and that he would meet Westrate and the others at the apartment in one half hour [R. T. 24]. Appellant arrived at the apartment and asked for $300 to pay for the marihuana [R. T. 25]; he told Westrate that he would get in touch with him at the Laurel Room, a bar in North Hollywood, later that night; apellant then departed [R. T. 26]. Then Westrate, Walker and Van de Ford together with Schutz, who had since arrived, left the apartment and went to the Laurel Room [R. T. 27]; these four sat at a table in the Laurel Room from early in the evening until 11:30 or 11:45 P. M. [R. T. 28]. At that time, Schutz left the bar, having seen appellant drive up outside [R. T. 28]. Schutz then met with appellant outside the bar and drove away in

his own car, following appellant back to the apartment [R. T. 80, 81]. There appellant delivered to Schutz a sack containing three kilograms of marihuana [R. T. 81]. Schutz then left the scene, drove a few blocks and met with Westrate and Van de Ford [R. T. 82]; Schutz delivered to the agents the marihuana which he had purchased from appellant [R. T. 83] and which was admitted into evidence at the trial.

V

ARGUMENT

The sole issue on this appeal, as framed by appellant's brief, is whether the evidence at trial supports the judgment of conviction with respect to the issue of entrapment which was raised. Appellant concedes, at page 5 of his brief, that entrapment as a defense can have been established here only if the evidence shows that appellant was induced to sell marihuana by governmental conduct which was shocking or offensive per se. Specifically, appellant contends that the activities of special employees Schutz and Van de Ford in ingratiating themselves with appellant for the purpose of making purchases of marihuana from him was conduct which should not be tolerated in a free society.

Decisions of the Ninth Circuit support the propriety of the activities of the government informers here. By appellant's own testimony, it is clear that he was "ready and willing to

commit the offense whenever the opportunity was offered. . . ."

Notaro v. United States, 363 F.2d 169 at 175
(9th Cir. 1966);

See also, Hill v. United States, 261 F.2d 483
(9th Cir. 1958).

Appellant himself testified that, prior to April 14, 1966, he had sold marihuana in kilogram quantities both to Larry Brittenham and to Bunny and Bones [R.T. 144-146]. The informant, Don Schutz, knew appellant as a seller of marihuana [R.T. 85]. Most important, appellant testified that neither Schutz nor Van de Ford nor any government agent asked him to sell marihuana prior to April 12, 1966 [R.T. 148]. Thus only two days elapsed between the first broaching of the subject and the sale by appellant as charged in the indictment. This case is thus not comparable to Sherman v. United States, 356 U.S. 369 (1956), wherein the Supreme Court held that entrapment existed as a matter of law. In Sherman the informer, representing himself as a narcotics addict, implored the defendant repeatedly to obtain narcotics for him in order to alleviate his suffering. No such implorings were necessary in order to persuade appellant Quevedo to sell marihuana; the evidence is clear that he was ready and willing to sell to Agent Westrate, who had been vouched for by Schutz and Van de Ford, just as he had previously sold to Brittenham and Bunny and Bones.

But appellant contends that he would not have sold to Westrate if Schutz and Van de Ford had not ingratiated themselves

as his friends, since appellant sold marihuana only to his friends, and that creating a friendship for the purpose of buying marihuana on behalf of the Government is a practice which should not be tolerated in a civilized society. In other words, appellant argues that he was willing to sell marihuana only to bona fide friends; Schutz and Van de Ford were not such friends; therefore appellant was not ready and willing to sell to them, and he was entrapped. This argument is without support in decided cases. If it were accepted by this Court, no prosecution for sale of marihuana or narcotics based on undercover negotiations could ever succeed, for every such sale is based upon the mistaken assumption that it is being made to a "friend" of the seller. It is submitted that to state appellant's argument is to refute it, and that the activities of the informants here were perfectly proper police practices. As the Supreme Court stated in Sherman v. United States, supra:

> ". . . the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity of law-enforcement officials." (356 U.S. at 372).

The use of special employees and government agents posing as go-betweens is clearly permissible.

Masciale v. United States, 356 U.S. 386 (1958)

It needs to be pointed out that neither Schutz nor Van de Ford

nor appellant himself ever stated at trial that there existed between appellant and either informant a close friendship which had been manufactured for the purpose of making purchases of marihuana. Such a friendship is solely an importation of appellant's brief. In fact Van de Ford testified [R. T. 63] that although he had seen appellant around the North Hollywood area prior to April 1966, it was only in April, not more than two weeks prior to the sale, that he became personally acquainted with appellant, and appellant confirmed this [R. T. 147-148]. The conclusion is inescapable that appellant was ready and willing to sell to anyone whom he considered a "safe" buyer.

Contrary to appellant's contention, the case of United States v. Whiting, 321 F. 2d 72 (1st Cir. 1963) does not support his position in this regard. Indeed, in that case the Court stated:

> ". . . . we hold that it is not per se offensive conduct for the government to initiate inducement without a showing of probable cause."

And:

> "If the type of identity misrepresentation made in this case is to be outlawed generally the whole structure of law enforcement involving government decoys must collapse." (321 U.S. at 77).

Just so in the present case: if the efforts of Schutz and Van de Ford to ingratiate themselves with appellant are to be found shocking and offensive per se, when by appellant's own admission there was evidence that the informants knew that appellant had

previously sold marihuana (Appellant's Brief, page 5), then the entire Government system of purchasing marihuana and narcotics through undercover activities designed to lull the seller will be destroyed.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer
MICHAEL HEUER